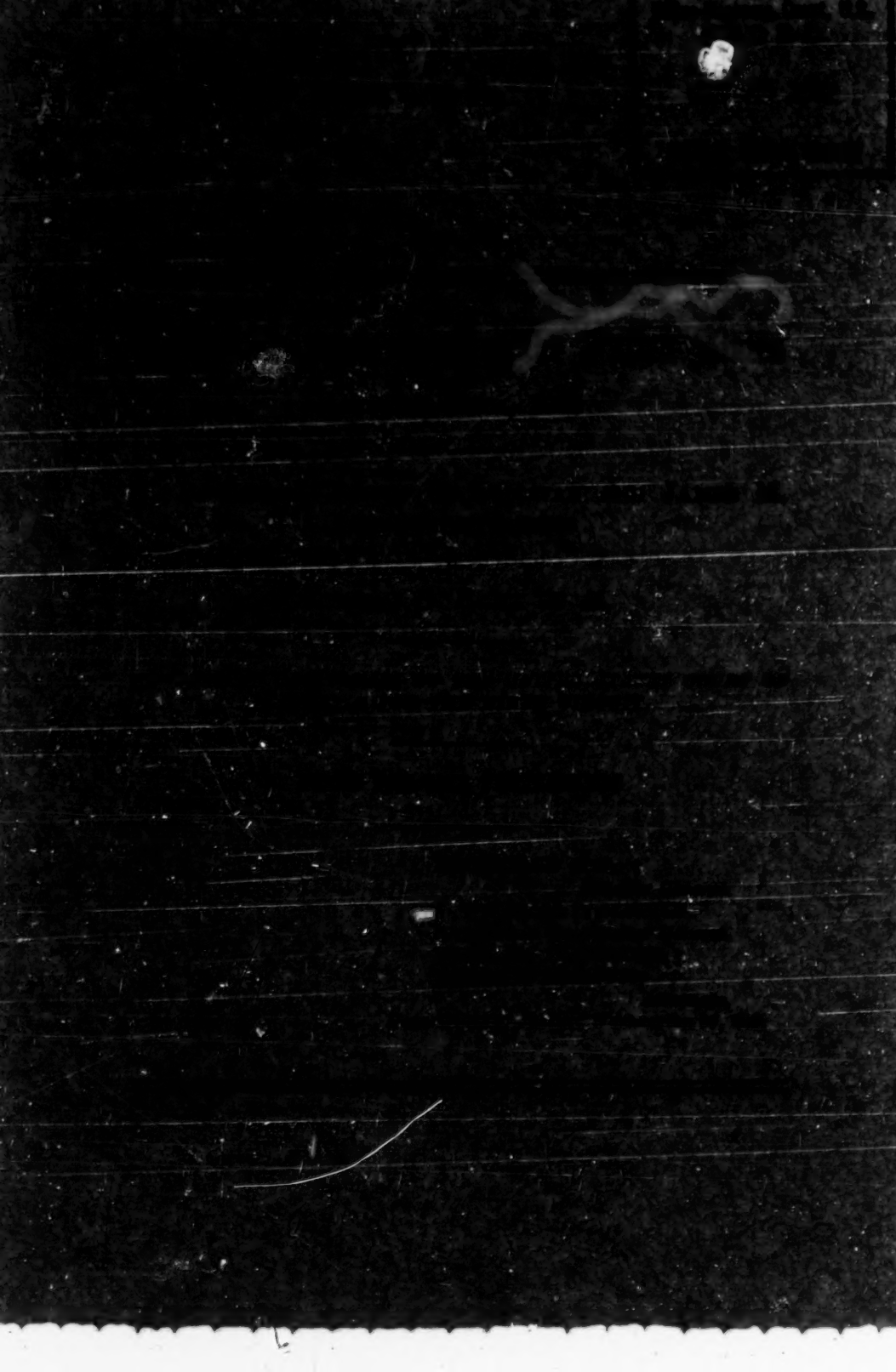


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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 31

H. P. DUGAN, EDWIN F. SULLIVAN AND JAMES M. INGLES, PETITIONERS

v.

EVERETT G. RANK ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion and supplemental opinion of the district court (R. VII: 22) are reported *sub nom. Rank* v. *Krug* (*United States*) at 142 F. Supp. 1–198. The opinion of the court of appeals, as corrected August 14, 1961 (R. VII: 364), is reported *sub nom. California* v. *Rank* at 293 F. 2d 340. Its opinion on rehearing (R. VII. 400) is reported at 307 F. 2d 91

JURISDICTION

The judgment of the court of appeals was entered March 31, 1961 (R. VII: 395). By order of Mr. Justice Douglas of June 16, 1961, the time for filing a petition for writ of certiorari was extended to August 28, 1961 (R. VII: 403). The petition for writ of certiorari was filed August 28, 1961, and was granted on April 2, 1962 (R. VII: 404). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 6 of the Reclamation Act of 1902, 32 Stat. 388, 389–390, 43 U.S.C. 491, 498, provides:

> That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this Act: *Provided,* That when the payments required by this Act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided,* That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.

Section 7 of that Act, 32 Stat. 389, 43 U.S.C. 421, provides:

> That where in carrying out the provisions of this Act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney General of the United States upon every application of the Secretary of the Interior, under this Act, to cause proceedings to be commenced for condemnation within 30 days from the receipt of the application at the Department of Justice.

Section 10 of that Act, 32 Stat. 390, 43 U.S.C. 373, provides:

> That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect.

The Rivers and Harbors Act of 1937, 50 Stat. 844, 850, provides in relevant part:

> *Provided further,* That the entire Central Valley project, California, heretofore authorized and established under the provisions of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) and the First Deficiency Appropriation Act, fiscal year 1936 (49 Stat. 1622), is hereby reauthorized and declared to be for the purposes of improving navigation, regulating

the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for the reclamation of arid and semiarid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes: *Provided further,* That, except as herein otherwise specifically provided, the provisions of the reclamation law, as amended, shall govern the repayment of expenditures and the construction, operation, and maintenance of the dams, canals, power plants, pumping plants, transmission lines, and incidental works deemed necessary to said entire project, and the Secretary of the Interior may enter into repayment contracts, and other necessary contracts, with State agencies, authorities, associations, persons, and corporations, either public or private, including all agencies with which contracts are authorized under the reclamation law, and may acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, water rights and other property necessary for said purposes: *And provided further,* That the said dam and reservoirs shall be used, first, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses; and, third, for power.

Section 2 of the Rivers and Harbors Act of 1940, 54 Stat. 1198, 1199, provides in relevant part:

The second proviso in section 2 of the Act of August 26, 1937 (50 Stat. 844, 850), authorizing the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes, is hereby amended to read as follows: "*Provided further,* That the entire Central Valley project, California, heretofore authorized and established under the provisions of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) and the First Deficiency Appropriation Act, fiscal year 1936 (49 Stat. 1622), is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for construction under the provisions of the Federal reclamation laws of such distribution systems as the Secretary of the Interior deems necessary in connection with lands for which said stored waters are to be delivered, for the reclamation of arid and semiarid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financial aiding and assisting such undertakings, and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes."

QUESTION PRESENTED

Whether a suit against officials of the Bureau of Reclamation, in which landowners sought and obtained an order enjoining the officials from operating a federal reclamation project unless the United States should build additional dams as directed by the dis-

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trict court and operate them under the continuing regulation of the court, is in fact a suit against the United States and hence, because the United States has not consented to suit, beyond the jurisdiction of the district court.[1]

STATEMENT

This case involves the Central Valley Reclamation Project in California, which was authorized to be undertaken by the Bureau of Reclamation of the Department of the Interior by the Reclamation Act of 1902, 32 Stat. 388, as amended, 43 U.S.C. 391, and the Act of August 26, 1937, 50 Stat. 844, 850. The project has been considered and described at length in this Court's opinions in *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275, and *United States* v. *Gerlach Live Stock Co.,* 339 U.S. 725. The facts relevant to the questions before this Court and the proceedings below may be summarized as follows:

1. *The physical facts.* The Central Valley is a four-hundred-mile-long bowl encompassing more than one-third of the State of California. The Central Valley Project is designed to conserve and put to the best use the waters available to the valley in two principal ways: *first,* by impounding waters, particularly snow melt, arising in the Sierra Nevada Mountains on the eastern side of the valley in reservoirs for release when most complete use can be made of

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[1] In its petition for a writ of certiorari, the government stated three questions presented (Pet. 2). It has not abandoned any of these questions but, believing them to be but different aspects of the central issue in the case, has assimilated them under a single question presented.

them; and *second,* by transporting waters of the Sacramento River, which flows through the northern part of the valley and develops a surplus of water, to the San Joaquin River, which flows through the southern part of the valley but which has insufficient water.

The San Joaquin River emerges from the Sierra Nevadas at Friant, flows generally west for a distance of sixty miles to Mendota, and then turns north to join the Sacramento River in the Sacramento-San Joaquin Delta; these rivers find a common outlet to the ocean through San Francisco Bay. The first basic objective of the project is served by Friant Dam, which captures the San Joaquin's waters as they flow from the mountain and impounds them in Millerton Lake. Most of this water is diverted northward through the Madera Canal and southward through the Friant-Kern Canal and delivered to a number of irrigation districts or similar public entities in areas that are badly in need of supplemental water supplies.

The second basic objective of the project is served by the Delta-Mendota Canal, through which water of the Sacramento River is pumped and transported southward to Mendota, where it is introduced into the bed of the San Joaquin to provide irrigation water for the lower portions of that river. The present case is concerned with the riparian and appropriative rights in the sixty-mile stretch between Friant (where virtually all of the San Joaquin's waters are diverted) and Mendota (where the natural flow of the San Joaquin is replaced by water from the Sacra-

mento) and with overlying rights (*i.e.*, rights to use underground water fed by the river) in the immediate vicinity.

2. *Administrative background.* The Central Valley Project originated as an undertaking of the State of California. When the State found itself unable to finance such an extensive project, federal financial assistance was sought and granted; eventually the project was taken over by the United States, primarily as a reclamation project but also for other purposes. It is the largest single reclamation project ever undertaken by the federal government. It is, and always has been, conducted on a basis of full cooperation between the United States and the State of California.

Friant Dam was put into operation October 20, 1941. In anticipation of the interference with existing rights that would eventually result from its full operation, negotiations were successfully conducted with many interested landowners. A number of contracts were executed, the most important of which was the one with Miller & Lux, Inc., described at some length in *United States* v. *Gerlach Live Stock Co., supra,* 339 U.S. at 741 (see also R. VII: 157–160), whereby the rights of Miller & Lux to the use of water below Friant were transferred to the United States in return for cash payments and elaborate agreements as to replacement water from the Sacramento River. Rights were acquired from others as a result of payment of Tucker Act judgments in the *Gerlach* case and other similar suits. Also, some 100 contracts have been executed with owners of proper-

ties between Friant Dam and Gravelly Ford some 34 miles downstream (R. III: 911–918). These contracts provide that the United States will maintain a live stream in the bed of the San Joaquin, and further provision is made as to channelization in the river, drilling of specified wells, etc. (R. III: 917). The United States has also acquired by assignment both water rights that had been possessed by Madera Irrigation District, the former owner of the Friant Dam site, and also various permits to appropriate unappropriated rights to the use of water which had been sought from the State before the federal government undertook the project. See *United States* v. *Gerlach Live Stock Co., supra,* 339 U.S. at 741.

Negotiations with some of the owners were unsuccessful. Since it had been claimed (as this Court later held in the *Gerlach* case in 1950) that a taking of rights impaired by operation of Friant Dam had occurred on October 20, 1941, the Bureau of Reclamation in the spring of 1947 wrote to those owners who had refused to execute settlement contracts that action should be taken promptly because the limitation period under 28 U.S.C. 2401 might expire on October 20, 1947 (R. I: 77–78). In response, the present suit was filed, and many of the plaintiffs also filed suits for compensation under the Tucker Act, which are still pending (R. VII: 227 n. 97).

3. *The trial court proceedings.* This suit was originally filed in a California state court by some 14 owners of land located below Friant Dam against

local officials of the Bureau of Reclamation.[2] The plaintiffs sought an injunction against the storing and diverting of the waters of the San Joaquin at Friant; alternatively, they sought a "physical solution" of their rights (R. I: 38–39).[3] The case was removed to the appropriate federal court. A three-judge district court upheld the constitutional power of the federal government to undertake the project, and a single judge thereafter denied motions to dismiss and for an interlocutory injunction. *Rank* v. *Krug*, 90 F. Supp. 773 (S.D. Cal.).

The State of California, which had intervened originally asking an injunction to require releases of water from Friant Dam to protect fish below the dam, reversed its position in 1951 and has since opposed the claim for injunctive relief as destructive of the Central Valley Project plan (R. I: 88–89; 18 Op. Cal. A.G. 31). The fifteen irrigation districts and other public entities which had contracted with the United States to receive water by virtue of the operation of Friant Dam also were made parties, and they likewise opposed the injunction. Supporting the plaintiffs and seeking additional relief were the City of Fresno and the Tranquillity Irrigation District (R. I: 195–198).

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[2] The Secretary of the Interior and the Commissioner of the Bureau of Reclamation were also named in the complaint but were not served and did not appear.

[3] California law, in order to prevent waste of water, has authorized the state courts to adopt and to supervise a "physical solution" whereby existing rights to the use of water are assured and the excess—especially flood waters—are put to beneficial use (see R. VII: 368–369).

The United States was not a party to the suit when it was filed. Temporary restraining orders, regulating releases from the dam, were entered in 1951, 1952 and 1953 by consent. However, that consent was withdrawn in 1953, and the court of appeals directed the district court to withdraw its 1953 order. *United States* v. *United States District Court,* 206 F.2d 303, 309. Later in 1953—after most of the evidence in the case had been received—the court ordered the United States joined as a party defendant under the Act of July 10, 1952, 66 Stat. 560, 43 U.S.C. 666, over the protest of the United States that it was immune from suit.

At about this same time, the Secretary of the Interior advised the Attorney General, in a letter that was filed in the case (R. VII: 295), of the Secretary's plan for the future operation of the dam. He stated, *inter alia,* that (R. VII: 298):

> the Department will release from Friant Reservoir into the bed of the river a sufficient quantity of water (1) to meet all valid legal requirements for the reasonable and beneficial use of water, both surface and underground, by reasonable methods of diversion and reasonable methods of use in that area, and (2) to provide, in addition thereto, a continuous live stream flowing at a rate of not less than five cubic feet per second at specified control points throughout the Friant-to-Gravelly Ford area, the last one to be at a point approximately one-half mile below the head of the Gravelly Ford Canal.

He emphasized that "the foregoing plan of operation of Friant Dam and Reservoir is an administrative one, voluntarily assumed and voluntarily to be executed" (R. VII: 299). Friant Dam has since been operated in accordance with the Secretary's stated plan, subject to adjustments required by weather and other conditions.

The district court rendered its opinion in January 1956, which was supplemented in July 1956 (R. VII: 22–293), its findings of fact and law in May 1957 (R. III: 861–960) and its decree in June 1957 (R. III: 960–1041). It defined the water rights of the plaintiffs (R. III: 961–990), both riparian and "overlying," and held that these rights[4] were superior to those of the defendants (R. III: 1003–1004). It made detailed findings of the injury that plaintiffs had suffered and would continue to suffer (R. III: 936–939), which it summarized in its opinion as follows (R. VII: 156):

> The impounding and diversion of water at Friant, as threatened shortly before this suit was filed, and as since carried out by defendants, and proposed to be carried out in the future, did not and does not and will not permit sufficient water to flow down the river to satisfy the lawful rights of the plaintiffs * * *.

It concluded that the plaintiffs would suffer irreparable injury if the full natural flow of the San Joaquin was not permitted to pass Friant, or unless the full

[4] Including those of the City of Fresno to water for municipal purposes (R. III: 1002). The district court ruled that Fresno was entitled to receive water from the United States at a price no greater than that charged to irrigation districts (R. VII: 271).

natural flow was simulated by a "physical solution" (R. III: 997).

Accordingly, it enjoined all defendants (including the United States):

> from impounding, or diverting, or storing for diversion, or otherwise impeding or obstructing the full natural flow of the San Joaquin River at or by means of Friant Dam, and/or the Friant-Kern Canal, and/or the Madera Canal * * *.

(R. III: 1020–1021). Alternatively, the decree provided that if, within a reasonable time, the United States should construct, operate and maintain a prescribed "physical solution," the injunction would not go into effect (*ibid.*). The "physical solution," which was defined in precise detail in the decree (R. III: 1021–1027), was summarized as follows by the court of appeals (R. VII: 372):

> a series of ten ponds in the natural channel of the river created by ten collapsible check dams to be so operated as to provide releases of water sufficient to flush and scour the aquifers by which river water found its way to the underground reservoirs from which the claimants of overlying rights received their water. * * * It was provided that a sufficient flow of water be released from Friant Dam to provide a minimum flow of five second feet over the last check dam downstream. * * *

The district court retained continuing jurisdiction in order to enforce the decree and to modify the "physical solution" if and when experience should prove a need for modification (R. III: 1030).

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4. *The proceedings on appeal.* On appeal, the court below reversed as to the United States, holding that it had not consented to be sued (R. VII; 372–376). However, as to petitioners, local officials of the Bureau of Reclamation, the judgment was affirmed. The court found that, although the government was authorized to acquire the plaintiffs' water rights by eminent domain—even by a physical taking in advance of judicial proceedings—the government's operation of the dam and its appurtenances had not been such as to accomplish an actual taking of those rights. The court also found that government agents were not authorized to trespass upon rights that the government had not acquired by eminent domain; from this the court reasoned that, in allegedly impairing platintiffs' water rights, the petitioning officers were acting beyond their statutory authority and hence were amenable to suit. The court concluded (R. VII; 393).

> We are concerned here with a balancing of the public interest which this project represents and the private interests represented by these plaintiffs. We cannot say that the district court was in error in determining the balance to fall in favor of the plaintiffs.[5]

[5] The court reversed the district court's judgment with respect to the City of Fresno (see note 4, *supra*). It held that Fresno's claim of a right to receive water from the United States at a certain price was barred by sovereign immunity. Fresno's petition for a writ of certiorari to review this decision was granted, 369 U.S. 836 (No. 51, Oct. Term 1962).

SUMMARY OF ARGUMENT

I

Although this suit was brought nominally against individual officials, it is in fact a suit against the United States and, because the United States gave no consent, it is barred by the doctrine of sovereign immunity. This is so, first, because the relief sought by the complaint and granted by the court's decree would operate directly against the United States itself. *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682. The injunctive branch of the decree would entirely prevent the operation of an important phase of a federal reclamation project. The affirmative (or "physical solution") branch would require the United States to construct additional public works at substantial expense. Nor does the fact that these forms of relief are alternative relieve them of their character as direct impositions on the government.

II

The second reason this suit is barred by sovereign immunity is that the relief sought and granted would require the disposition of sovereign property. *Larson* v. *Domestic & Foreign Corp., supra.* Both branches of the court's decree would call for the release of much water and the dissipation of many water rights owned by the government. Moreover, the injunctive branch would deny the federal government the use of costly public works belonging to it. And the affirmative branch would not only deprive the government of the full use of such facilities but would force the government to yield an important measure

of control over them to a district court. Such a forced surrender to the courts of the power to control and administer federal property is wholly without warrant or precedent.

III

This suit does not fall within the exceptions to the doctrine of sovereign immunity announced in *Larson* v. *Domestic & Foreign Corp., supra,* concerning conduct by officers of the government that is either unconstitutional or in excess of statutory authority. There is no serious question in this case as to the government's constitutional authority to undertake and carry out the Central Valley Project. Nor is the governmental conduct involved here constitutionally void for want of an adequate remedy for any injury occasioned by it; a Tucker Act suit for compensation is available to the plaintiffs.

The court below held that the government was authorized to acquire water rights for the Central Valley Project by physical seizure. However, the court went on to hold that the government's operation of Friant Dam fell short of a taking of the plaintiffs' water rights because it did not identify the rights affected with sufficient precision, and that its conduct was therefore a mere "trespass" that was unauthorized for purposes of sovereign immunity. This circumvention of the doctrine of sovereign immunity is entirely without foundation.

The court's theory is based on the premise that physical takings must be accompanied by a precise identification of the private property interests that are being taken. Such a notion is entirely contrary

to the settled law of eminent domain. The whole basis for the concept of physical taking is the fact that it is often difficult or impossible to determine in advance just what effect governmental action will have on private property interests. To require such a prediction as a condition precedent to the exercise of the power of physical taking would for all practical purposes preclude the use of that form of condemnation. The decisions of this Court have clearly established that no such requirements attach to authorized physical takings of property by the government.

Moreover, the governmental conduct involved here was fully authorized by Congress. The court below recognized that the government had the general authority to condemn property either formally or physically. There being no clear limitation on that general authority, interferences with private property such as those at issue here were plainly "authorized" for purposes of sovereign immunity. Furthermore, Congress was aware of the manner in which the government operated Friant Dam and ratified that conduct by reauthorizing the project and appropriating necessary funds.

ARGUMENT

By all of the applicable standards that have been developed by this Court, the present suit, although nominally against individual officials, is actually a suit against the United States; and, since, as the court below correctly found (R. VII: 376), the United States has not consented to this suit, it is barred by sovereign immunity. In the first place, the relief sought by the complaint and granted by the district

court—alternatively, an injunction against the operation of a federal project or a mandate to construct certain public works—operates directly against, and requires affirmative action by, the United States itself. In the second place, the court's decree directs the disposition of property owned by the United States. Finally, this suit is within neither of the two exceptions to the doctrine of sovereign immunity recognized by this Court: the governmental actions complained of were neither unconstitutional nor beyond the authority delegated by Congress. The suit should clearly have been dismissed as beyond the jurisdiction of the district court.

I. THIS SUIT IS BARRED BY SOVEREIGN IMMUNITY BECAUSE THE RELIEF SOUGHT AND GRANTED WOULD OPERATE DIRECTLY AGAINST THE UNITED STATES ITSELF

It is well settled by the decisions of this Court that a suit purportedly against a federal official is in fact a suit against the United States where the effect of the judgment sought would be "to restrain the Government from acting, or to compel it to act." *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 704. Thus, if the judgment would "expend itself on the public treasury or domain, or interfere with the public administration," the suit is against the sovereign. *Land* v. *Dollar*, 330 U.S. 731, 738. The fact that the judgment would be directed only to subordinate officials does not change the character of the suit, for, of course, "the sovereign can act only through agents." *Larson* v. *Domestic & Foreign Corp.*, *supra*, 337 U.S. at 688. Whether or not the relief sought does in actuality operate directly against the United States

is determined by "the essential nature and effect of the proceeding." *Ex parte New York,* 256 U.S. 490, 500, 502; see also *Mine Safety Appliance Co.* v. *Forrestal,* 326 U.S. 371, 374.

Even the most superficial appraisal of "the essential nature and effect" of this proceeding clearly discloses that the relief sought and granted operates directly upon the national government. The negative branch of the decree enjoins the petitioners, officials of the Reclamation Bureau, "from impounding, or diverting, or storing for diversion, or otherwise impeding or obstructing the full natural flow of the San Joaquin River * * *" (R. III: 1021).[6] The actual and intended effect of this injunction is clear. As the court below observed, the Central Valley Project "could not operate without impairing, to some degree, the full natural flow of the river" (R. VII: 384). This branch of the decree thus contemplates the abandonment by the United States of a congressionally authorized reclamation project. It would restrain the United States from employing the great public works—the Friant Dam and the Madera and Friant-Kern canals—which it has constructed as a part of the project. It would prevent the United States from carrying out the water-supply contracts it has made with public agencies in the areas to be benefited by those works. To say that such a decree operates not against the United States but against the individual petitioners is to ignore the obvious. It is difficult to imagine how the federal government itself

[6] Such relief was sought by the plaintiffs in their complaint (R. I: 38).

could be more completely and directly "stopped in its tracks," *Larson* v. *Domestic & Foreign Corp., supra,* 337 U.S. at 704, than it would be by the district court's injunction.

The affirmative branch of the decree (the so-called "physical solution") provides that the injunction will not go into effect if the United States should within a reasonable time construct a series of ten collapsible check-dams and operate them in such a way as to maintain a specified flow of water in the river bed.[1] There is no equivocation as to the effect of this branch of the decree; as the court below pointed out in its opinion on rehearing, "if the physical solution is to be utilized, it will be by or on behalf of and at the election of the United States," and "if the United States desires to proceed with this decreed solution * * *, it should bear the expense" (R. VII: 401). This branch of the decree would require the United States to depart from the congressionally approved plan for the Central Valley Project by the construction of additional works, thus "interfer[ing] with the public administration." It would require the United States to expend substantial additional sums of money for that construction, thus "expend[ing] itself on the public treasury," *Land* v. *Dollar, supra,* 330 U.S. at 738. It would, in short, "require affirmative action by the sovereign," *Larson* v. *Domestic & Foreign Corp., supra,* 337 U.S. at 691, n. 11, and must therefore fall as violating the sovereign's immunity from suit.

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[1] The complaint sought such a "physical solution" (R. I: 38–39).

Thus, "the essential nature and effect" of each branch of the relief sought and granted below—the injunction and the "physical solution"—operates directly upon the government and brands the suit as one against the United States itself. But, states the court below in justifying its affirmance of the district court's decree, "the decree does not require anyone to take action" (R. VII: 383): in other words, the United States is not compelled to follow either branch of the decree—if it does not wish to comply with one branch, it is entirely free to be governed by the other.[8] Surely the doctrine of sovereign immunity cannot be so easily circumvented. If the United States cannot be restrained from following a particular course of action and likewise cannot be required to adopt another course of action, it would rob the doctrine of all substance to hold that the United States *can* be forced to choose between those two equally unenforceable mandates. Posing two alternatives is not enough to conceal the fact that the decree restrains the United States from following any other course of action, including the course of its choice. To require the United States to select be-

[8] The court of appeals also suggests (although the district court's decree did not so provide) that the additional alternative of condemnation of outstanding water rights remains open to the United States (R. VII: 383–384). As we point out below (see pp. 35–37, *infra*), this alternative is only theoretically available; moreover, it, too, would seem to involve such a requirement of affirmative action by the sovereign as to be beyond the power of the court.

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tween two objectionable alternatives is, under these circumstances, to require an affirmative act.[9]

II. THIS SUIT IS BARRED BY SOVEREIGN IMMUNITY BECAUSE THE RELIEF SOUGHT AND GRANTED DIRECTS THE DISPOSITION OF PROPERTY OF THE UNITED STATES

It is also settled that a suit for relief that would "require * * * the disposition of unquestionably sovereign property," *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 691, n. 11, or that would "expend itself on the public * * * domain," *Land* v. *Dollar*, 330 U.S. 731, 738, is in fact a suit against the United States, although only subordinate officials are named in the complaint. See also *Malone* v. *Bowdoin*, 369 U.S. 643, 646; *Larson* v. *Domestic & Foreign Corp.*, *supra*, 337 U.S. at 709–710 (dissenting opinion). The present suit plainly falls within this category. Both branches of the district court's decree would require the United States to dispose of extremely valuable irrigation water and would deprive the United States of the full use and control of reclamation facilities it has constructed.

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[9] The court below also held, relying on *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, and *Williams* v. *Fanning*, 332 U.S. 490, that the Secretary of the Interior was not an indispensable party to this proceeding because the decree does not require affirmative action on his part. In so ruling the court plainly erred. It is clearly the Secretary, in whom Congress has vested responsibility over the project (see p. 25, *infra*), who must decide which branch of the decree to follow, and either branch would call for action (terminating reclamation operations at Friant or constructing new facilities) that only he could authorize.

It is indisputable that—whether the United States opens the gates of Friant Dam and drains Millerton Lake as the injunction would demand, or pours enough water into the river bed to satisfy the considerable requirements of the "physical solution"—the court's decree would require the United States to dispose of substantial quantities of water to which the United States has the use rights. Under the injunction, the water that the United States has impounded behind the dam for project uses (cf. R. VII: 89) would be diverted forever.[10] The water rights that the United States has acquired at a cost of millions of dollars (see, *e.g.*, R. VII: 37–38; see also *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725) would be rendered valueless as the project waters are dissipated in the manner contemplated by both branches of the decree. The United States would be unable to satisfy the contracts it has made with many public bodies to deliver them much-needed irrigation water.

It is equally clear that the decree below would deny the United States that complete dominion and control over its own reclamation facilities to which it is entitled. The district court's injunction expressly provides that "Friant Dam, and/or the Friant-Kern Canal, and/or the Madera Canal"—all federally constructed, -owned[11] and -operated facilities—shall not

[10] Under California law, "water stored in a reservoir is 'real property, the right to the use of which may become appurtenant to land.'" Hutchins, *California Law of Water Rights*, p. 39.

[11] Section 6 of the Reclamation Act of 1902, 32 Stat. 389, 43 U.S.C. 498, provides that "title to * * * the reservoirs and the works necessary for their protection and operation shall

be used to impound, divert or store the waters of the San Joaquin (R. III: 1021). If the United States is thus to be deprived of the right to use these costly public works for the only end to which they are adapted, it has for practical purposes lost valuable property rights.

If the other branch of the decree—the "physical solution" (R. III: 1021-1028)—goes into effect, the United States will not only be deprived to a significant degree of the use of its reclamation facilities, but it will be forced to surrender an important measure of control over them to the district court. Under the "physical solution," the United States would first have to construct ten dams at locations and according to detailed specifications laid down by the court. It would then have to release designated quantities of water from Friant Dam at specified times and in such a way as to maintain specified levels of water behind the ten dams. It would be subject for the indefinite future to the court's reserved power to modify the plan "as experience may show to be necessary" (R. III: 1030; see also R. III: 1003). The government would, in brief, be required to operate the project and its facilities—including existing facilities such as Friant Dam—under the continuing supervision of the district court.

There is no warrant in constitutional, statutory or decisional law for such a forced surrender to the courts of the power to control and administer federal

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remain in the Government until otherwise provided by Congress." See also *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 298-299.

property. Section 3 of Article IV of the Constitution "confers upon Congress exclusively 'the power to dispose of and make all needful rules and regulations respecting the territory of other property belonging to the United States.'" *Sioux Tribe* v. *United States,* 316 U.S. 317, 324. There are no limitations on this power. See *Federal Power Commission* v. *Idaho Power Co.,* 344 U.S. 17, 21. Congress has delegated full authority to administer the facilities of federal reclamation projects to the Secretary of the Interior. Thus, Section 6 of the Reclamation Act of 1902, 32 Stat. 389, 43 U.S.C. 491, 498, provides that the "management and operation of the reservoirs and works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress" and authorizes the Secretary "to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this Act." See also Section 9 of the Reclamation Project Act of 1939, 53 Stat. 1193, as amended, 43 U.S.C. 485h, and Section 10 of the Reclamation Act of 1902, *supra,* 43 U.S.C. 373.

Even where Congress has provided for the judicial review of administrative decisions relating to public property, "that authority is not power to exercise an essentially administrative function." *Federal Power Commission* v. *Idaho Power Co., supra,* 344 U.S. at 21. However, with respect to the management or control of reclamation projects and facilities, Congress has not purported to confer any authority whatsoever, either *ab initio* or on review of the Secretary's actions.

Indeed, as Judge Pope suggested in his concurring opinion at an earlier stage of this proceeding, *United States* v. *United States District Court*, 206 F. 2d 303 (C.A. 9), there is at least a serious question whether Congress could confer the authority to manage and control public works on courts created under Article III of the Constitution.[12]

Over one hundred years ago, this Court announced in *Decatur* v. *Paulding*, 14 Pet. 497, 516, the principle that must govern any effort on the part of the courts to assume essentially administrative functions:

> The interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them. * * *

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[12] Plainly enough, there is no warrant for reading Section 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. 383, which makes state law applicable to federal reclamation projects, as consenting to judicial administration of the Central Valley Project on the theory that California law contemplates judicially-administered "physical solutions." This Court in *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 291, rejected the notion that, because of Section 8, state law overrode provisions of the reclamation laws, stating: "As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects. As the Court said in *Nebraska* v. *Wyoming*, [325 U.S. 589, 615]: 'We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system.'"

This principle has found expression in several recent cases in which attempts were made to circumvent the federal government's immunity to suit by seeking to place administrative power over federal property in the hands of district judges. In *New Mexico* v. *Backer*, 199 F. 2d 426 (C.A. 10), an injunction was sought against officials of the Reclamation Bureau for allegedly tortious conduct (reducing the water level in a reservoir so low that fish were dying and creating a health menace) in the operation of Elephant Butte Dam on the Rio Grande River. The court sustained the officials' claim that the suit was in fact one against the United States, stating (199 F. 2d at 428):

> The operation of the project and facilities depended upon the flow of water from the reservoir. If this flow could be enjoined or affected by court decree or order directed to Backer [the Reclamation Bureau official], he would be under the direction of the court and not his superiors as representatives of the United States. It would be a complete ouster of the United States over the control and management of its own property and facilities.

Likewise, in *Hudspeth County Cons. & Recl. Dist. No. 1* v. *Robbins*, 213 F. 2d 425 (C.A. 5), the court held that a suit for injunction and declaratory relief against Bureau of Reclamation officials for allegedly *ultra vires* actions (various actions in derogation of the plaintiffs' water rights) in connection with the same Rio Grande Project was in fact a suit against the United States that could not be maintained (213 F. 2d at 432):

> Whatever may be the merits of the plaintiffs' contentions, the court would have no jurisdiction by declaratory judgment * * * or by injunction against Government officers to substitute itself in any part of the management and operation of the dams, reservoirs and facilities for the agency designated by Congress. * * *

So here, either branch of the district court's decree—the injunction or, *a fortiori,* the "physical solution"—would, by transferring supervisory authority over federal reclamation facilities to a court, deprive the United States of their full use and control. As we have noted, both branches of the order would also require the release of much water and the dissipation of many water rights owned by the federal government. And we point out again that phrasing these directives as to the disposition of federal property in the alternative—thus creating an illusion of "free choice" on the part of the sovereign—does not relieve them of their invalid character. We submit that the relief sought and granted in this suit plainly calls for "the disposition of unquestionably sovereign property," *Larson* v. *Domestic & Foreign Corp., supra,* 337 U.S. at 691, n. 11, and hence it is an action against the United States itself which cannot be maintained without consent.

III. THIS SUIT IS BARRED BY SOVEREIGN IMMUNITY BECAUSE THE GOVERNMENTAL ACTION COMPLAINED OF WAS NEITHER UNCONSTITUTIONAL NOR BEYOND STATUTORY AUTHORITY

Since the relief sought and granted in this suit would operate directly against the United States and

would direct the disposition of federal property, there is no need to pursue the matter further; either of these circumstances alone required the dismissal of the suit for want of jurisdiction. As this Court stated in *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 691, n. 11:

> Of course, a suit may fail, as one against the sovereign, *even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers,* if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. * * * [Emphasis supplied.]

See also *Hudspeth County Cons. & Recl. Dist. No. 1* v. *Robbins,* 213 F. 2d 425, 432 (C.A. 5). The present case well illustrates the wisdom of that ruling: if there was in fact any defect in the petitioning officers' authority to act (as the court below held there was), that defect is wholly unrelated and entirely disproportionate to the impact of this suit on the federal government. However, as we now show, not only was the conduct complained of clearly within constitutional bounds, but it was fully authorized by Congress. It thus falls within neither of the exceptions to the doctrine of sovereign immunity developed by the decisions of this Court and most recently articulated in *Malone* v. *Bowdoin,* 369 U.S. 643, 647:

> [T]he action of a federal officer affecting property claimed by a plaintiff can be made the basis of a suit for specific relief against the

officer as an individual only if the officer's action is "not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void." * * *

A. THE ACTS COMPLAINED OF ARE NOT CONSTITUTIONALLY VOID

The conduct against which this suit is directed is an alleged interference with plaintiffs' water rights. Acting under color of their authority as officials of the Bureau of Reclamation, the petitioning officers operated Friant Dam in such a way as to divert water from the San Joaquin River into the Friant-Kern and Madera canals to provide irrigation water to the various public bodies with which the United States had contracted. Because the United States had also contracted to deliver water to certain users on the San Joaquin below the dam, some water was released into the bed of the river; however, substantially less than the full natural flow of the river was permitted to pass the dam (R. VII: 389, 390). Plaintiffs, water users on or near the San Joaquin, contend that this diminution of the flow of the river interfered with rights they claim to have in its water.

No serious claim could be advanced that the petitioning officers' conduct was "constitutionally void," nor does the court below make any such suggestion. This Court said in *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 294, "There can be no doubt of the Federal Government's general authority to establish and execute the Central Valley and Santa Barbara County projects." And this Court's allow-

ance of a Tucker Act recovery in *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, was necessarily premised on the existence of constitutional authority to conduct the Central Valley Project. Significantly, both of these cases were concerned with the operation of the very reclamation works involved in this case—Friant Dam and the Friant-Kern and Madera canals. See also *New Mexico* v. *Backer*, 199 F. 2d 426, 428 (C.A. 10); *Hudspeth County Cons. & Recl. Dist. No. 1* v. *Robbins*, *supra*, 213 F. 2d at 429.

As this Court recognized in *Malone* v. *Bowdoin*, *supra*, 369 U.S. at 647–648, a governmental interference with private property may be constitutionally void if there is no remedy available by which the aggrieved party may secure just compensation as guaranteed by the Fifth Amendment. However, there is no such problem here. The remedy of a suit for compensation under the Tucker Act, 28 U.S.C. 1346(a)(2), 1491, has always been available to these plaintiffs; indeed, some of them have filed Tucker Act suits with respect to the very alleged interferences at issue here (R. VII. 392, see p. 9, *supra*. If, as we contend, the governmental conduct complained of was authorized, that remedy is the only one available to plaintiffs. *Hurley* v. *Kincaid*, 285 U.S. 95, 104; *Yearsley* v. *W. A. Ross Constr. Co.*, 309 U.S. 18, 21–23.

B. THE ACTS COMPLAINED OF ARE NOT BEYOND THE OFFICERS' STATUTORY AUTHORITY

This Court's decisions in *Ivanhoe Irrigation District* v. *McCracken*, *supra*, 357 U.S. at 294, and *United States* v. *Gerlach Live Stock Co.*, *supra*, implicitly

affirmed that the Central Valley Project has been fully authorized by Acts of Congress. The court below recognized that Congress had duly sanctioned the project (R. VII: 367); indeed, it specifically found most aspects of the operation of the project at Friant Dam to have been authorized by Congress. Thus, it found that "the United States is expressly authorized by statute to acquire, by the exercise of its power of eminent domain, such water rights as are felt to be necessary to accomplish the purposes of the Central Valley Project" (R. VII: 380); moreover, it found that Congress intended that that power be exercised not only by judicial condemnation but by so-called "inverse condemnation" (*i.e.*, physical seizure) as well (R. VII: 386–387). The court also found that, "[i]n negotiating and contracting for the delivery of water from Friant Dam, defendant officials were acting within the scope of their statutory authority and were carrying out the duties imposed upon them by their official positions" (R. VII: 381).

In spite of its having so broadly sustained the statutory authority for the conduct of operations at Friant Dam, the court below held that the actions by which the petitioning officers allegedly injured the plaintiffs' interests were beyond their statutory authority, and hence that this suit could be maintained against them under the second exception to the doctrine of sovereign immunity set forth in *Malone* v. *Bowdoin, supra,* 369 U.S. at 647. The reasoning behind this ruling was as follows (R. VII: 387–392): Congress authorized the physical taking of water rights, and, had the petitioning officers closed the

gates of Friant Dam completely, such an authorized taking of plaintiffs' water rights would have occurred. However, the petitioning officers failed to accomplish such an unequivocal taking, because, although they diverted most of the flow of the river at Friant Dam, they continued to release a certain amount of water into the river bed (in order to fulfill the contractual obligations of the United States). Their action, falling short of a taking, was a mere "trespass," and the petitioning officers were not authorized by Congress to trespass upon the plaintiffs' water rights. That line of reasoning and the conclusion to which it leads are, we submit, wholly lacking in any legal substance.[13]

1. The factual premise on which the court below based its conclusion that the petitioning officers' conduct constituted not an authorized taking but an unauthorized trespass was this (R. VII: 391–392):

> In the case at bar, the operation of Friant Dam was not of such a character as to notify these plaintiffs as to the extent of the seizure of their rights. Nor was it accompanied by any sufficiently definite uttered or written notification.

Similarly: "In an exercise of its power of eminent domain * * *, the United States must commit itself as to what is taken and as to what remains untaken" (R. VII: 391). Again: "If one's sole remedy for

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[13] One authority has observed that, in so reasoning, the court below circumvented the doctrine of sovereign immunity "on grounds which seem flimsy." Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. of Chi. L. Rev. 435, 456, n. 77 (1962).

such a 'taking' is to be an action for compensation in the Court of Claims, he must know what of his right has been taken: as to amounts, as to flows, as to methods of diversion" (*ibid.*). Thus, it becomes clear that, in the court's view, what turned an otherwise authorized taking into an unauthorized trespass was that, by taking only part of plaintiffs' rights rather than all of them, the petitioning officers failed to identify with sufficient particularity just what it was that was being taken. On that reed alone stands the court's ruling that the doctrine of sovereign immunity is inapplicable to the present suit.

At the outset, it must be observed that even on its face that would be anomalous doctrine. As we have seen, the court recognized that the petitioning officers, acting on behalf of the United States, were duly authorized to take water rights by physical seizure; that proposition was, of course, settled by this Court's ruling in *United States* v. *Gerlach Live Stock Co., supra,* that the closing of the gates at Friant Dam had accomplished a compensable taking of those plaintiffs' water rights. And the court below also recognized that if the petitioning officers had taken *all* of plaintiffs' water rights, their conduct would be fully authorized (R. VII: 387, 391). In the court's view, then, in order for the petitioning officers' conduct to be authorized, they may not seize water rights only to the extent needed in the public interest, leaving the remainder undisturbed for the private owners' continued enjoyment: they must seize *all* such rights, those that are needed and those that are not. Not only is such an "all-or-nothing" rule anomalous; it

is flatly at odds with the settled law of eminent domain.

The notion that, in order to "take" property the government must first identify with particularity what it will take is entirely inconsistent with the very concept of "physical taking." Where the government can foresee what the effects of a federal project will be on private property, it normally employs the process of judicial condemnation, identifying with such clarity as is feasible the property to be affected. However, when the impact of such a project on private rights is unclear—where, indeed, there is a question as to whether the project will effect any compensable taking at all—the government proceeds with the construction and operation of the project, remitting the property owner to his Tucker Act suit for compensation. Thus, the whole basis for the physical taking concept is the impossibility of describing in advance the extent to which certain kinds of property are to be compensably taken, and this Court has repeatedly recognized the appropriateness, in such cases, of determining the fact and extent of the taking only after it has been accomplished. See, *e.g., United States* v. *Lynah,* 188 U.S. 445; *United States* v. *Kansas City Ins. Co.,* 339 U.S. 799; *United States* v. *Gerlach Live Stock Co., supra.* There is no question but that, if the lower court's limitation on the government's power to take property physically should be generally applicable, that form of condemnation would no longer, for any practical purpose, be available to the government.

This case aptly demonstrates the impossibility of attaching a "prior identification" requirement to inverse condemnation. As is often the case where rights to natural water are to be encroached upon by man-made structures—see, *e.g., United States* v. *Kansas City Ins. Co., supra; United States* v. *Willow River Power Co.*, 324 U.S. 499—the unpredictable forces of nature largely determine the degree of the encroachment. The extent to which the government's operation of Friant Dam interferes with plaintiffs' water rights obviously depends upon such natural vagaries as temperature, precipitation, evaporation losses, stream-flow losses, upstream diversions, return flow, etc. The actual operation of the dam, as reflected in the record, substantiates the impossibility of predicting with precision how much water will flow past the dam and, accordingly, to what extent the plaintiffs' water rights will be interfered with. As the court below noted, the flow was 170 cubic feet per second in June 1954, 125 in September 1954, 145 in June 1955 and 133 in September 1955 (R. VII: 392, n. 10). While the record does not disclose to what extent this variation in flow was the product of natural forces and to what extent the product of fluctuating operational and contractual requirements, these facts do show—and the court below implicitly recognized—the impossibility of predicting in advance the impact of the operation of Friant Dam upon plaintiffs' rights.[14] Thus, if the government

[14] Moreover, as the California courts have recognized, even without regard to the impact of the operations of the dam, plaintiffs' water rights cannot be measured in advance with any

can employ inverse condemnation at Friant Dam only by giving advance notice of the extent to which its operations there will affect downstream water rights, it is denied the power to employ that form of condemnation just as effectively as it would have been had Congress expressly forbidden it to do so.[15]

That a precise description of the property to be taken need not—because it cannot—be revealed in advance of a physical taking (particularly where, as is said to be the case here, whatever taking there is is only partial) was plainly reflected in this Court's opinion in *United States* v. *Cress*, 243 U.S. 316, 328–329:

> Where formal proceedings are initiated by the party condemning, it is usual and proper to specify the precise interest taken, where less than the fee. But where, as in this case, the property-owner resorts to the courts, as he may, to recover compensation for what actually has been taken, * * * and it appears that less than the whole has been taken and is to be paid

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precision. The Supreme Court of California, in *Prather* v. *Hoberg*, 24 Cal. 2d 549, 559–560, 150 P. 2d 405 (1944), after noting that a riparian owner's right to water entitles him only to a reasonable amount in relation to the needs of others, said: "No mathematical rule has been formulated to determine such a right, for what is a reasonable amount varies not only with the circumstances of each case but also varies from year to year and season to season."

[15] Of course, the government cannot achieve the total physical condemnation suggested by the court below (*i.e.*, by completely closing the gates to the dam) because of its contractual obligations to provide some water to certain users below the dam—obligations that the court below found to be within the government's statutory authority (R. VII: 381).

> for, such a right or interest will be deemed to pass as is necessary fairly to effectuate the purpose of the taking * * *.

In that case and in many others, this Court has held that the most general description—usually in terms of what governmental activity is permissible rather than of the extent of the impairment of the plaintiff's property—will suffice to identify the subject of a physical taking. Thus, the interest taken in the *Cress* case was defined by the Court (243 U.S. at 329) as

> an easement in the United States to overflow [plaintiff's land] with water as often as necessarily may result from the operation of the lock and dam for purposes of navigation.

In *United States* v. *Kansas City Ins. Co., supra,* 339 U.S. at 811, the Court approved the following description of the interest taken:

> The privilege [on the part of the government] * * * of permanently maintaining Lock and Dam No. 26 at their present height, and operating them in such a manner as to fulfill the purposes of their construction and other purposes which may develop in the future and do not greatly vary from present purposes.

And these were descriptions that were held sufficient to describe the property taken *after* it had been judicially determined that a compensable physical taking had occurred. Surely the government's original act of seizure need be no more precise and unequivocal than the ultimate judicial decree conclusively defining what property passed hands.

Indeed, even formal complaints in judicial condemnation proceedings need not specify how the alleged interests of the defendants will be affected by the condemnation. Rule 71A(c)(2), F.R. Civ. P., provides that "[t]he complaint shall contain a short and plain statement of * * * the interests to be acquired * * *." See also Form 29, F.R. Civ. P. No allegations as to the nature of the interests claimed by the defendants are required. Similarly, the Declaration of Taking Act of 1931, 46 Stat. 1421, 40 U.S.C. 258a, provides simply for a statement "of the estate or interest in said lands taken for said public use." In *United States* v. *2648.31 Acres of Land in Charlotte Co.*, 218 F. 2d 518, 519 (C.A. 4), a condemnation complaint was held sufficient which sought merely to acquire the right "to overflow, permanently or intermittently, as may be necessary as a result of the construction, maintenance and operation of the John H. Kerr Dam and Reservoir," the property of the condemnation defendants. Is the assertion of the right to interfere, "permanently or intermittently, as may be necessary as a result of the construction, maintenance and operation" of Friant Dam and its appurtenant works, with the water rights of downstream users any less clearly a valid exercise of the power of eminent domain?

In the rare instances in which the Court has insisted upon greater specificity in the description of property physically seized, it has recognized that the lack of requisite specificity has nothing to do with whether a lawful taking has occurred. Thus, in *United States*

v. *Causby*, 328 U.S. 256, the Court, although finding the description of an easement of flight insufficient because not expressed "in terms of frequency of flight, permissible altitude, or type of airplane" (328 U.S. at 267), held that such an easement had been taken and remanded the suit to the Court of Claims for a more precise description. So here, a lack of certainty "as to amounts, as to flows, as to methods of diversion" (R. VII: 391) has no bearing on the question of whether an authorized physical taking has occurred. The lower court's error is in confusing the *fact* of taking with the *extent* of taking. "But it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking." *United States* v. *Cress, supra*, 243 U.S. at 328; see also *United States* v. *Dickinson*, 331 U.S. 745.

The difficulty of precise description of the extent of the rights taken from the plaintiffs would not, moreover (as the court below seems to suggest, R. VII: 391), present any problem in their Tucker Act suits for compensation, since compensation is awarded on the basis not of an evaluation of the specific rights taken but of any diminution in the market value of the plaintiffs' property resulting from the governmental action. See, *e.g.*, *United States* v. *Kansas City Ins. Co.*, 339 U.S. 799; *United States* v. *Holmes*, 238 F. 2d 229 (C.A. 4) (same rule in formal condemnation cases).[16] The Tucker Act case is tried after the effects of the taking on each individual's

[16] That case concerned the valuation of the land involved in *United States* v. *2648.31 Acres of Land in Charlotte Co., supra.*

property have been felt; speculation may be eliminated by consideration of facts that have developed even up to the date of trial. *United States* v. *Westinghouse Co.*, 339 U.S. 261; *United States* v. *Brooklyn Union Gas Co.*, 168 F. 2d 391 (C.A. 2). Moreover, any indefiniteness arising out of the possibility that the government may change its mode of operating Friant Dam (cf. R. VII: 388, n. 8, 392, n. 10) is taken due account of by the fact that "the owners will be entitled to additional compensation if the value of the lands is adversely affected thereby." *United States* v. *2648.31 Acres of Land in Charlotte Co.*, *supra*, 218 F. 2d at 522; see also *United States* v. *Broudum*, 272 F. 2d 642, 646 (C.A. 5). We question whether the task of determining to what extent, if any, the plaintiffs have suffered compensable injury will prove any more insuperable than it has been in any of the scores of surface and subsurface water-right and flight-easement cases that Tucker Act courts have been called upon to decide.

In sum, the lower court's unsupported ruling that an otherwise authorized physical taking of plaintiffs' water rights by the petitioning officers became an unauthorized trespass because it did not identify the property rights taken with sufficient precision is founded on a wholly erroneous conception of the law of eminent domain. It not only misconceives the character of condemnation by physical seizure, but it would for all practical purposes eliminate that form of condemnation as a practicable mode of governmental action; clearly that would be so with respect to the operations involved in this case. That it was

necessary for the court below so to torture the law of eminent domain in order to bring the petitioning officers within the "unauthorized conduct" exception to the doctrine of sovereign immunity demonstrates, we submit, the fundamental error in the decision below."[17]

2. Furthermore, however the petitioning officers' conduct in relation to the plaintiffs' water rights is described—taking, interference, or trespass—it was, we submit, fully authorized by Congress. It seems clear that where a federal official's conduct is within the general scope of his authority, that conduct will not be held to be "unauthorized" so as to bring the exception to sovereign immunity into play, unless there is a clear, express limitation on that authority. Thus, in *Larson* v. *Domestic & Foreign Corp., supra,* the Court emphasized that the disputed power exercised by the officer was "[a] normal concomitant" of his general powers (337 U.S. at 692) and that there was no "statutory limitation" on those powers (337 U.S. at 692; see also 337 U.S. at 691, n. 12, 695, 701, n. 24). See also *Malone* v. *Bowdoin, supra,* 369 U.S. at 647. The force of this proposition is underlined

[17] The court's error is perhaps explainable by the fact that most of the States in the Ninth Circuit impose prior limitations on the physical seizure mode of condemnation, such as requiring that compensation be first paid into court. See *e.g.*, Arizona Const., Art. 2, § 17; California Const., Art. 1, § 14; Montana Const., Art. 3, §§ 14, 15; Nevada Const., Art. 1, § 8; Oregon Const., Art I, § 18; Washington Const., Art. 1, § 16. As we have shown, there is no such limitation on the federal eminent domain power, and, as the court below held (R. VII: 385), it is the federal eminent domain power that is involved here.

by the fact, to which we refer in more detail below, that even tortious conduct is not as such within the "unauthorized conduct" exception to the doctrine.

The court below conceded that the petitioning officers had general authority to interfere with plaintiffs' property rights by judicial condemnation or physical taking (R. VII: 386–387). No statutory limitation on that power was alleged in the complaint, see *Larson* v. *Domestic & Foreign Corp., supra,* 337 U.S. at 690; *Malone* v. *Bowdoin, supra,* 369 U.S. at 648, n. 9, nor did the court point to any express limitation on this conceded general authority. Without any citation of legislation, legislative history or precedent, it simply inferred a limitation upon the petitioning officers' authority to take property physically: that any physical taking must precisely disclose the interest being taken (R. VII: 380).[18] There is no basis for inferring any special limitation whatever on this general condemnation authority, let alone one that, as we have shown, is so clearly inconsistent with the set-

[18] The court cited Section 8 of the Reclamation Act of 1902, note 12, *supra* (providing that the Secretary of the Interior shall "proceed in conformity with" state laws "relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder") for the proposition that "[a]s to rights not so acquired [i.e., by eminent domain], the duty of the Bureau and of these defendants is to respect them" (R. VII: 380). However, the court recognized that Section 8 has no effect whatever on the federal government's exercise of its power to take property needed for the project: "While a state can bestow property rights on its citizens which the United States must respect, it cannot take from the United States the power to acquire those rights" (R. VII: 385). See also *Ivanhoe Irrigation District* v. *McCracken, supra,* 357 U.S. at 291.

tled law relating to physical takings. Moreover, if, as the court below concedes, Congress intended the petitioning officers to proceed by way of physical taking, it must have intended that they engage in the conduct complained of here; for, as we have pointed out (see pp. 35–37, *supra*), this was the only way in which they could have accomplished a physical taking. If the means they employed were not open to them, then they were powerless to carry out their conceded power of inverse condemnation.

Not only was the petitioning officers' conduct well within their general statutory authority, but Congress was aware of, and may be considered as having ratified, the manner in which they and their predecessors operated Friant Dam and its appurtenant works. On several occasions, Congress was advised of the fact that the operation of the dam was allegedly interfering with the water rights of users below the dam and of the means the Bureau was employing in an effort to solve this problem. In 1948, the then regional director of the Bureau in Sacramento, in discussing an appropriation item before a House Appropriations Subcommittee, testified:

> We have certain payments to make for those water users whose use of the water we have damaged, or are damaging through the operation of the Friant Reservoir and the diversion of the San Joaquin River water down the Friant-Kern canal and out through the Madera canal. Some of this money will be used in settling those cases.[19]

[19] Hearings on the Interior Department before a Subcommittee of the House Committee on Appropriations, 80th Cong., 2d Sess., pp. 1279–1280 (1948).

The following year, in his report on the Central Valley Project, the Secretary of the Interior advised Congress:

> [T]here are a number of other water-right owners along San Joaquin River below Friant Dam which will be affected by the regulation of the river. Investigations of these individual rights and the settlement of justifiable claims for damage due to proposed operation of Millerton Lake are now in progress.[20]

In 1957, a comprehensive review of the Central Valley Project was submitted to Congress. With respect to landowners on the San Joaquin immediately below Friant Dam, it reported:

> Negotiations were conducted with this group of land owners for more than a decade, resulting in 99 water rights adjustment contracts and 17 supplemental contracts. Some of these provide for the construction by Reclamation of minor irrigation facilities, some for the performance of river channel work, and some for cash payments to the land owners. The total amount of water represented is relatively small * * *. Several cases went to litigation * * *.[21]

The report also explained that the United States would meet the contractual obligations thus undertaken by releasing a specified amount of water from Friant Dam into the bed of the river.[22]

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[20] S. Doc. No. 113, 81st Cong., 1st Sess., p. 213 (1949).

[21] Central Valley Project Documents H. Doc. No. 246, 85th Cong., 1st Sess., p. 616 (1957).

[22] *Id.* at p. 734.

Congress was thus duly advised of the impact the project was having on water users below Friant Dam and of the ways in which the Bureau was attempting to resolve the problem. With this knowledge, Congress continued throughout this period to reauthorize the project (see, *e.g.*, *Ivanhoe Irrigation District* v. *McCracken, supra,* 357 U.S. at 293) and to appropriate funds for the continued operation of Friant Dam and appurtenant facilities, including funds for the execution of settlement agreements by cash payments and the construction of necessary additional facilities (see H. Doc. No. 246, 85th Cong., 1st Sess., pp. 2–3 (1957)). This, we submit, constituted a full ratification of the administrative actions taken by the Bureau and the petitioning officers in the operation of the dam as it related to the plaintiffs' water rights, just as this Court found similar congressional action to have amounted to a ratification of the administrative actions involved in *Ivanhoe Irrigation District* v. *McCracken, supra,* 357 U.S. at 292–294.

There is some suggestion in the decision of the court below that it regarded the petitioning officers' conduct as "unauthorized" for purposes of sovereign immunity because it was tortious. The court characterized their conduct as a "trespass" (R. VII: 391) and indicated that it either "sounds in tort" or is "an actual taking of property" (*ibid.*; see also R. VII: 390). Of course, if their conduct constituted "an actual taking of property" it was authorized (R. VII: 386–387), and the plaintiffs' only remedy is a Tucker Act suit for compensation. *Hurley* v. *Kincaid, supra.* And if their conduct constituted a "mere trespass"

(R. VII: 390), it is settled that it would not on that account bring into play the "unauthorized conduct" exception to the doctrine of sovereign immunity. This Court succinctly resolved that issue thus in *Larson* v. *Domestic & Foreign Corp., supra,* 337 U.S. at 695:

> We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency.

And see 337 U.S. at 686–687, 692–695; see also *Malone* v. *Bowdoin, supra,* 369 U.S. at 646–647; *Hudspeth County Cons. & Recl. Dist. No. 1* v. *Robbins, supra,* 213 F. 2d at 432; *New Mexico* v. *Backer, supra,* 199 F. 2d at 428–429. Accordingly, if the theory of the court below is that the petitioning officers' conduct was unauthorized because tortious—and it is difficult to see on what other theory it could even purport to find a lack of authority—it plainly erred.

For the reasons we have set forth in this section of the brief, we believe the ruling of the court below—that the petitioning officers' operation of Friant Dam was "unauthorized" because it did not identify the interests affected with sufficient precision to constitute an authorized physical taking of those interests—is without the slightest foundation. Its assumption that any sort of specification of the interests taken need accompany a physical taking is contrary to the law of eminent domain and, indeed, to the very concept

of physical taking. Furthermore, the petitioning officers' conduct was clearly within their general statutory authority and was specifically ratified by congressional reauthorizations of the project and appropriations of funds. There is, we submit, no reasonable basis for concluding that the governmental action involved here was "not within the officer's statutory powers," *Larson* v. *Domestic & Foreign Corp., supra,* 337, U.S. at 702, so as to bring an exception to the doctrine of sovereign immunity into play.

CONCLUSION

It is submitted that the judgment below should be reversed with directions to dismiss the action for want of jurisdiction.

Respectfully submitted.

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